

The Honorable Robert S Lasnik

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In Pro Per**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

I. Introduction

COMES NOW, Plaintiff James McDonald and respectfully files this response and objection to Defendants' OneWest, MERS and Northwest Trustee Services Motion for Protective Order filed under FCRP 26. Plaintiff moves the Court to Strike Defendants Motion for Protective Order.

II. Evidence Relied Upon

1. Defendants' Motion for Summary Judgment
 2. Plaintiff's Response to Motion for Summary Judgment
 3. Plaintiff's First Request to Produce Documents
 4. Plaintiff's Motion to Compel Discovery
 5. Joint Status Report

III. Argument

A. Defendants Motion for Protection Order is beyond the time limits for objection per FCRP 34.

On April 4th, 2011, Plaintiff served Defendants OneWest, Northwest Trustee and MERS through their joint counsel, Heidi Buck of Routh Crabtree Olsen, Plaintiff's first request to produce documents (Docket #54). According to Federal Rules of Civil Procedure 34(b)(2)(A), "*Time to Respond.* The party whom the request is directed must respond in writing within 30 days after being served." For whatever reason, the Defendants failed to respond or object within the time limit granted by the CR. Therefore the Defense's

1 Motion for Protection Order is out of the time allotted to object and the Court may prohibit the Defense
2 from raising any objections or requests as allowed by FCRP 37(b)(2)(A)(ii).

3 On May 5th, Plaintiff filed a Motion to Compel (Docket #56) after Defendants failed to respond within the 30
4 days allotted as described above. Rather than respond to the Motion to Compel, Defense has chosen to
5 cost both the Court and the Plaintiff further time and resources by filing this frivolous Motion. The Court
6 now not only has to expend time and resources in reviewing the appropriately filed Motion to Compel and
7 related arguments, it now has to waste its time with this meritless Motion for Protective Order.

**8 B. Defendants Motion for Protection Order is in Violation of the Joint Status Report Agreement
9 with this Court and following Minute Order from the Court.**

10 On March 23rd, 2011 Plaintiff and Defendants created and jointly signed the Joint Status Report (Docket
11 #43). Two specific portions of this Joint Status Report show that the Defendants Motion for Protection
12 Order is frivolous.

- 13 1. Section 5(b) states, "The parties agree that discovery on Plaintiff's allegations and
14 Defendants' defenses may be needed. The parties agree that at this time **there does not
15 appear to be a need to do discovery in phases or that any limitations on discovery
16 should be imposed.**"
- 17 2. Section 5(c) states, "The parties agree that **there does not need to be any changes to the
18 normal limitations on discovery.**"

19 Defense was already well aware that Plaintiff would be requesting all items in Plaintiff's First Request to
20 Produce **prior to making the agreement set forth in the Joint Status Report.** Plaintiff had already
21 requested these exact items on multiple occasions prior to the agreement. Those occasions were:

- 22 1. Requested in the Qualified Written Request and Debt Validation Demand served to
23 Defendants MERS, Northwest Trustee Services and OneWest Bank on April 27th, 2010
(Docket #17F).
- 24 2. Listed in Plaintiff's Initial Complaint (Docket #1) on December 3rd, 2010.
- 25 3. The willingly withdrawn but not stricken Plaintiff's Motion for Declaratory Judgment (Docket
26 #32) on February 12, 2011.
- 27 4. Plaintiff's Response to Defendant's Answer to Initial Complaint (Docket #31) on February 11,
28 2011.

29 Therefore Defense had sufficient notice prior to the agreement set forth in the Joint Status Report on March
30 23rd, 2011 to attempt to limit the scope of discovery from the documents they knew would be requested
31 considering those documents have been requested by the Plaintiff for **OVER A YEAR.**

1 Defendants' failure to cooperate or act in good faith by even to responding within the time given by FCRP
 2 34 is a clear **violation of the Joint Status Report agreement** in Section 5(d) where Defense agreed, "The
 3 parties agree to consult with each other regarding discovery issues, if any, and to cooperate in facilitating
 4 discovery." The Defense not only failed to object to any item requested in the time allotted but failed to
 5 respond whatsoever.

6 **C. Defendants' Motion Fails on the elements of showing good cause why a Protection Order
 7 should be granted.**

8 Defendants so kindly provided a list of the elements required to show good cause in allowing for a
 9 Protection Order to be granted in their Motion for Protection Order.

- 10 1. Whether the defendant has made a strong showing that the plaintiff's claim is unmeritorious
 - 11 i. The defendants have failed to make a strong showing that the claims are
 unmeritorious. In point of fact with the inclusion of the Custodial Agreement (Docket
 12 #49, Exhibit 8) in the Motion for Summary Judgment they have assisted in proving the
 Plaintiff's claim by showing OneWest is not the holder of the note nor is it considered
 the beneficiary. This directly shows that all of Plaintiff's claims, which were already
 well supported, have merit.
- 13 2. the breadth of discovery and the burden of responding to it
 - 14 i. The Defense fails to make any argument about the breadth of discovery and the
 burden of responding to it save that they have filed a Motion for Summary Judgment.
 15 However the majority of the items requested by the Plaintiff have direct relation to all
 16 arguments made by the Defendants in their Motion for Summary Judgment including:
 - 17 1. Who actually purchased the Note from Indymac Bank.
 - 18 2. Were the endorsements and conveyances properly executed
 - 19 3. A copy of the servicing agreement Defendants once again claim to have but
 have never provided which is the basis of their defense that allegedly gives
 them the rights to foreclose and all proceeds from the trustee sale.
 - 20 4. Strict proof that Freddie Mac is the current owner of the note rather than
 having sold it into a mortgage backed security.
 - 21 5. That no insurance claims have been filed and proceeds received to payoff all
 or a portion of the Note in question.
 - 22 6. That the debt is even valid by providing all accounting and general ledger
 entries relating to the Note as required by the Fair Debt Collection Practices
 Act when a Debt Validation Demand has been issued.
 - 23 3. the risk of unfair prejudice to the party opposing the stay
 - 24 i. The risk to Plaintiff as the party opposing the stay far outweighs any burden to the
 Defendants as the moving party. The risk to the Plaintiff is no less than an unfair

1 judgment against him without the full facts shown above being brought to the attention
 2 of the Court! The Defendant OneWest claims to have an all powerful servicing
 3 agreement which **they refuse to provide yet utilize as evidence**. They further make
 4 unproven claims of ownership, amounts and rights throughout the Motion for
 5 Summary Judgment. The Court ruling on unproven evidence would be extremely
 6 unfair prejudice against the Plaintiff and cause unnecessary appeals, time and
 7 taxpayer dollars to unravel.

8 4. whether the defendants have joined in the stay request

9 i. Of course OneWest, MERS and Northwest Trustee joined in the stay request. They
 10 are all represented by the same attorney! Rather than independently defend
 11 themselves, they have chosen to gang up on the Plaintiff in an effort to rub him out.
 12 Therefore they are not independently joining in a request, they are continuing to
 13 perpetrate the same behavior that caused the lawsuit to be filed in the first place.

14 **D. Plaintiff's Request for Production is not unduly burdensome or expensive to the Defendants.**

15 The Defense's claim that Plaintiff's requested documents would be overly expensive to the Defendants is
 16 ludicrous. While Plaintiff believes the hourly billable rate of Routh Crabtree Olsen is likely higher than
 17 average, Plaintiff will utilize a more average hourly fee. It appears through various attorneys that Plaintiff
 18 has spoken with that \$250 an hour is a common fee. Plaintiff will also utilize the most minimal time spent on
 19 the following documents the defense attorney would have billed her clients in an effort to avoid this so
 20 called undue expense.

- 21 1. Reviewing Motion to Compel and Drafting a Response: 1 hour at \$250
 22 2. Writing the Motion for Protection Order: 1 hour at \$250
 23 3. Replying to Plaintiff's Response to Motion for Protection Order: 1 hour at \$250.
 24 4. This brings the total expenses to a minimum of \$750

25 Now we look at the likely expenditures in what the Defendants would have incurred had they simply
 26 cooperated as they agreed to do. OneWest Bank is located in Austin, TX. Through Salary.com Plaintiff
 27 chose the higher median salary of a Paralegal III over an Executive Administrative Assistant. That median
 28 income is \$58,748 a year¹. This breaks down to \$30.60 an hour so Plaintiff will utilize \$31. Now as this is
 1 generally a salary position, no overtime is being considered. So to give the Defendants the benefit of the
 2 doubt, let us absurdly believe that it takes one hour for each of the 15 items rather than a much more
 3 expedited approach since the majority of the items are likely reachable within a few keystrokes on a
 4 computer.

1 Salary.com salary for a paralegal III <http://swz.salary.com/SalaryWizard/Paralegal-III-Salary-Details-austin-tx.aspx>

1 5. 15 items at 1 hour each at a rate of \$31 per hour: \$465

2 6. Shipping and copying costs estimate: \$50

3 7. Total expense for complying with the request to produce: \$515

4 Had the Defendants cooperated as they agreed to do based on all of the knowledge they had as to what
 Plaintiff would be asking for prior to the agreement made in the Joint Status Report they would have saved
 at minimum \$235. In all likelihood these numbers are extremely skewed in the Defendants' favor. So the
 Defendants argument that the request is unduly expensive is ridiculous at best.

5 As far as being unduly burdensome, this defense is equally ridiculous. Had any of the parties that have
 signed personal knowledge under the penalty of perjury actually researched the Note in question, the
 majority of these documents would have been accessed or reviewed so should be extremely easy to come
 by. The only exception to this would be the accounting and general ledgers which should have been
 provided as requested over a year ago when the Qualified Written Request and Debt Validation Demand
 under the Fair Debt Collection Practices Act and other laws was delivered. It has been found by many
 courts that to comply with the statute and protect the consumer's rights validation requires presentment of
 the account and general ledger statement signed and dated by the party responsible for maintaining the
 account. *Pacific Concrete F.C.U, v, Kauanoe*, 62 Haw. 334, 614 P.2d 936 (1980); *GE Cap/fa/ Hawaii, Inc.*
v. Yonenaka, 25 P.3d 807, 96 Hawaii 32 (Hawaii App 2001); *Fooks v. Norwich Housing Authority*, 28 Conn.
 L. Rptr. 371, (Conn. Super.2000); *Town of Brookfield v. Candlewood Shores Estates, Inc.*, 513 A.2d 1218,
 201 Conn. 1 (1986); and *Solaon v. Godbole*, 163 Ill. App. 3d 845, 114 Ill. Dec. 890, 515 N.E. 2d 1045 (3rd
 Dist 1987).

17 **E. Plaintiff's Requested Documents Directly Affects the matters held within the Defendants
 Motion for Summary Judgment.**

18 Each of the items Plaintiff has requested has a direct impact on the Motion for Summary Judgment. They
 are and apply as follows:

19 1. Original purchase agreement and subsequent purchase agreements of the Note in question.

20 According to Freddie Mac's website they do not retain loans they have purchased but resell
 them². Defense claims in the Declaration of Charles Boyle (Document 49-3) that Plaintiff's
 Note is apparently the exception to the rule as Defense claims that Freddie Mac is and has
 always been the owner of the Note since it was purchased from Indymac Bank. Based on the
 information provided by Freddie Mac this claim is unbelievable and must be authenticated.

21 2. A true and correct chain of title through endorsements/conveyances of the Note in question.

22 The same above applies here. Further as MERS misrepresented transferring ownership of the
 Note to OneWest when MERS was not the owner this is even more important.

28 ² http://www.freddiemac.com/corporate/company_profile/our_business/

3. Copies of any and all servicing agreements related to the Note. The Defense utilizes an alleged servicing agreement that they refuse to provide as the basis of their standing and exoneration of all violations that Plaintiff has alleged. They utilize this document without proving its existence in the Motion for Summary Judgment. Therefore the Plaintiff and the Court needs to see this document.
4. The same as above. Plaintiff was kind enough to break the agreements into two requests so as not to be confusing to the Defense.
5. Insurance Policies relating to the Note. If an insurance claim has been made and paid in part or in full this greatly impacts the proceedings.
6. MERS MIN Summary for the Note and Deed of Trust in question. This further goes to show a chain of title or lack thereof.
7. MERS Membership Agreement for Indymac. What rights does MERS have to transfer ownership of a Note it does not own?
8. MERS Membership Agreement for Freddie Mac.
9. MERS Membership Agreement for OneWest Bank.
10. A copy of all accounting records and general ledgers related to the Note in question. As shown above in Section D until such a time as this has been provided collection activities must stop as required by 15 U.S.C. 1692 §809. Which also means that no bond should have ever been required of the defendant to obtain a preliminary injunction as the Defendant OneWest never complied with the validation demand.
11. A true and correct copy of the Beneficiary Declaration made to Northwest Trustee by OneWest. One would think that Northwest Trustee would jump at the chance to prove they did not begin the process dishonestly, yet they refuse to provide it?
12. All exhibits and schedules related to the agreements utilized as Exhibits 4-8 in the Defendants Motion for Summary Judgment. The Defense failed to provide this documentation within their Motion and it directly impacts the reliability and the applicability of these documents as evidence within the matter before the Court!
13. Form 1034 relating to the Note in question as utilized in the Defense's Motion for Summary Judgment Exhibit 8. The Defense wants to use an exhibit but not prove that the Note is a part of the exhibit.
14. Form 1036 relating to the Note in question as utilized in the Defense's Motion for Summary Judgment Exhibit 8. The Defense wants to use an exhibit but not prove that the Note is a part of the exhibit.
15. All records from MIDANET that pertain to the Note in question. Again this is referenced in Defense's Motion for Summary Judgment Exhibit 8 but we have no full information for the Court to make an honest judgment on.

F. Granting Defendants Motion for Protection Order Unfairly Causes Adversity to Plaintiff

1 Should the Court grant the Defendants Motion for Protection Order the Plaintiff will be adversely affected in
2 these proceedings.

- 3 1. While the Defendants and their counsel will benefit from a delay in order to try to wear down
4 the Plaintiff, the Plaintiff continues to have to divert attention from his professional, financial
5 and personal life to fight for his civil rights.
- 6 2. Plaintiff has spent approximately 10 hours of his life writing this single response. That is 10
7 hours away from finding new clients, servicing current clients and continuing his efforts to
8 recover from the large amount of issues caused by the Defendants' actions over the last 15
9 months. Adding on additional months of fighting them would create additional constraints on
10 Plaintiff's goals and will likely impact the likelihood of surviving through this ordeal.
- 11 3. Delaying the use of Plaintiff's civil rights of discovery only allows the Defendants time to lose
12 or destroy important records or fabricate records that are vital to the case at hand. While this
13 would have been absurd to Plaintiff prior to the financial meltdown there have been too many
14 cases that show this is in fact happening in these types of lawsuits as was so clearly shown on
15 a recent report on 60 Minutes.
- 16 4. If the delay should occur Plaintiff will continue to have to pay into the court bond for a longer
17 period of time instead of hiring acceptable counsel and/or being compensated for the
18 damages, both punitive and violations, that he will receive at the end of the trial as a direct
19 result of the Defendants actions.

20 The Defendants benefit from a longer action with continued write offs of their attorney expenses and
21 staving off the judgment Plaintiff firmly believes will come against them. The Defendants' Counsel continue
22 to make money in billable hours and continues that benefit the longer she represents the Defendants in
23 these matters. Plaintiff lives with the stress and direct negative effect this matters has on his life. While he
24 is willing to fight against the wrongs done to him, dragging it out in frivolous actions is unacceptable
25 especially since the procurement of the requested documents would likely result in a much speedier
26 resolution to these matters.

27 **IV. Conclusion and Relief Requested**

28 An attorney Plaintiff once met compared litigation to a game of chess. Each side places their moves in a
29 strategic way to try and take the others king, or in this case to win the lawsuit. With the Defendants outright
30 refusal to abide by the Joint Status Report agreement and the timeline stipulated in FCRP 34 they are
31 playing a game more like a carnival Whack-A-Mole. While Plaintiff is certain that he will "whack" them when
32 the documentation is compelled to be provided, a great deal of both his and the Court's time is being
33 wasted due to their frivolous motions and outright refusal to abide by both the agreement made and the
34 rules of this Court.

Wherefore

- A. Plaintiff hereby moves the Court to Strike Defendants Motion for Protection Order as allowed by FDCRP 37(b)(2)(A)(iii).
 - B. Plaintiff hereby moves the Court to Deny with Prejudice Defendants Motion for Protective Order for the reasons listed above.
 - C. Plaintiff moves the Court to grant financial sanctions of \$2500 against the Defendants and their counsel payable to the Plaintiff as allowed by FCRP 37(b)(2)(C).
 - D. Plaintiff moves the Court to find the Defense in contempt of the Minute Order page 4 under Cooperation (Docket #44) by failing to even attempt to resolve any concerns or objections with the Plaintiff in the time allowed by FCRP 34 as allowed by FCRP 37(b)(2)(A)(vii).

V. Proposed Order

A proposed Order is attached to this response.

/s/ James McDonald -
James McDonald
Pro Se

Certificate of Service

I hereby certify that on the 22 day of May, 2011 the foregoing was electronically filed with the Clerk of the Court using the ECF system, which sent notification and therefore served the following:
Heidi Buck
Routh Crabtree Olsen
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/s/ James McDonald -
James McDonald
Pro Se